IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19546 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

==========

SANDEEPBHAI VINUBHAI PATEL - Petitioner(s)
Versus
RAMJIBHAI MAGANBHAI PARBADIA & 7 - Respondent(s)

==========

Appearance :
M/S THAKKAR ASSOC. for Petitioner(s) : 1,
MR PARTHIV B SHAH for Respondent(s) : 1,
None for Respondent(s) : 2 - 8.

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 05/09/2006

ORAL JUDGMENT

1. By way of this petition, the petitioner has prayed for issuance of writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the judgment and order under challenge dated 15th

September, 2005, passed by the learned Additional District Judge (Fast Track Court No.13), Vadodara in Civil Misc. Application No.100 of 2005. The learned Judge vide impugned order dismissed the application preferred under Section 5 of the Indian Limitation Act.

2. When the present petition had come up for admission hearing on 10th October, 2005, after hearing the learned counsel appearing for the parties, the Court was inclined to reserve the judgment considering the workload with the Court as per the Roster. It was jointly submitted by the learned counsel appearing for the parties that as the fate of the parties rests mainly on the finding recorded by the learned Judge while disposing the Application Ex.5 preferred under Order 39 Rules 1 and 2, and Section 151 of the Code of Civil Procedure, 1908, the Court may give final verdict if it thinks fit and, therefore, on 14th October, 2005, this Court, in the background of the submissions made and arguments advanced by the learned counsel

appearing for the parties, pronounced the final verdict dismissing the petition in limine, saying : *"... on the reasons shall follow hereinafter, the present petition challenging the order passed by the learned Additional District Judge and Presiding Officer of Fast Track Court No.13, Vadodara in Civil Misc. Application No.100/2005 dated 15.09.2005 is hereby dismissed on admission stage."*

3. As the petition was dismissed, the record of the petition had remained with the Registry under a bona fide mistake, probably after sending the writ and when it was pointed out by the learned counsel appearing for the parties, the file is called for from the Registry with a view to assign reasons for not admitting the petition and to complete the order and hence, the present order dismissing the present petition is passed.

4. The petition was listed for admission initially on 27th September, 2005 and thereafter, on consent of the learned counsel

appearing for the parties, the petition was adjourned to 03rd October, 2005 and 05th October, 2005. On 14th October, 2005, the Court took up the hearing and the learned counsel appearing for the parties also concluded their respective arguments. Mr.Parthiv B. Shah as was appearing on Caveat, his submissions of resistance were considered, while passing the final order of dismissal.

5.1 To appreciate the said submissions placed before the Court, it is necessary to state the facts leading to filing of the present petition. The petitioner is one of the plaintiffs of Special Civil Suit No.323 of 2001. The petitioner along the respondent nos.3 to 8 herein had instituted a suit against the respondent nos.1 and 2 herein for declaration that a Sale Deed dated 23rd February, 2001 as well as the compromise decree passed in Regular Civil Suit No.628 of 1995 be declared null and void. Obviously, in view of the nature of declaration prayed for, consequential relief of permanent injunction has also been prayed.

5.2 In the background of the substantive reliefs prayed for in the Suit, the plaintiffs by drawing supplementary proceeding vide an application Ex.5 under Order 39 Rules 1 and 2 and Section 151 of the Code of Civil Procedure, 1908, prayed for interim relief inter alia praying for restraining the respondent nos.1 and 2 from entering into the disputed land referred to in the Suit and/or disturbing and interfering with the alleged possession of the petitioner as well as the respondent nos.3 to 8. It was also prayed that the plaintiffs may not be prevented from cultivating the Suit land. As per the order of the Court, the Court Commissioner carried out the panchnama in respect of the land in question in Special Civil Suit No.323 of 2001. The Suit is filed on 10th April, 2001 and on that very day, the application praying for interim relief was moved. In the Suit, seven persons were joined as party defendants including contesting opponents Ramjibhai Maganbhai Parbadia and Bharatkumar Shankarbhai Somani as defendant nos.3 and 5, respectively.

These very defendant nos.3 to 5 approached the Court of learned Civil Judge (S.D.), Vadodara by way of filing a Suit being Regular Civil Suit No.470 of 2001 on 16th April, 2001 and also prayed for interim relief vide application Ex.5 on the very same day. In Regular Civil Suit No.470 of 2001, all the seven plaintiffs of Special Civil Suit No.323 of 2001 were shown as defendants. For resolution of the dispute which has been brought before this Court, both the suit proceedings can be considered as cross suits for some parcel of agricultural land situated at village Harni of Tal.Vadodara. The original Survey Number of the land is shown to be Survey No.187 and the area of the land is shown about 11,635 sq.mtrs. It is clear from the documents supplied to the Court along with the petition as documents relied upon by the petitioner that the learned Civil Judge (S.D.), Vadodara dismissed the application Ex.5 as it was not pressed for by the advocate appearing for the plaintiffs of the Suit and, therefore, it was obviously required to be treated as dismissed and allowed the

application Ex.5 preferred by the plaintiffs of Regular Civil Suit No.470 of 2001. So considering the relief granted in favour of contesting opponents Ramjibhai Maganbhai Parbadia and Bharatkumar Somani (i.e. defendant nos.3 and 5 of the Special Civil Suit No.323 of 2001), the petitioner along with other defendants preferred Civil Misc. Appeal under Order 43 Rule 1(R) of the Code of Civil Procedure, 1908 on 29th April, 2005, challenging the relief granted in that suit No.470 of 2001. It is alleged that the plaintiffs including plaintiff of Special Civil Suit No.323 of 2001 were found in possession of the disputed agricultural land. It is also alleged that the plaintiffs of Regular Civil Suit No.470 of 2001 had suppressed the fact about pendency of Special Civil Suit No.323 of 2001 and the ad interim relief was granted in favour of the plaintiffs of that suit. The order granting interim injunction by allowing the application Ex.5 in Regular Civil Suit No.470 of 2001 dated 05th August, 2003 was challenged by aforesaid Civil Misc. Appeal on 29th April, 2005. As the order

allowing application Ex.5 was of 05th August, 2003, the appellants had obviously prayed for condonation of delay under Section 5 of the Limitation Act caused in preferring the said appeal under Order 43 Rule 1(R) of the Code of Civil Procedure, 1908. The learned Judge dismissed the application praying for condonation of delay observing that the delay is gross and ultimately the Suit filed by the parties and the main Civil Suit i.e. Regular Civil Suit No.470 of 2001, when is yet to be decided on merit, the delay is not required to be condoned only for the sake of condoning it. While recording this finding, the learned Judge has observed that the applicant has also failed in explaining the delay of 60 days caused even from the date of knowledge of the adverse order passed. The learned Judge has also not accepted the say of the petitioner that because of the mistake committed by the lawyer, the plaintiffs were not intimated and, therefore, they were not knowing about the adverse order passed against them in favour of the plaintiffs of Regular Civil Suit No.470 of 2001. It is observed that the applicants

themselves when were plaintiffs in Special Civil Suit No.323 of 2001, and had participated in the proceedings by engaging the advocate in Regular Civil Suit No.470 of 2001, it is not possible for the Court to accept the plea for condonation on the ground that the advocate had not informed them about finding recorded by the Court and, therefore only, they were compelled to relieve the advocate from the proceedings, being found negligent.

6. On plain reading of the order passed by the learned Additional District Judge, it is clear that the reasons assigned by the learned Judge are sound and logical reasons. It is true that the approach of the Court in such or similar proceedings should be liberal and the party should not be asked to suffer on account of any negligence or misconduct on the part of the lawyer appearing for the party in any matter. One affidavit in support of the petition is filed by Sandip Patel, Advocate; and in support of his affidavit, he has submitted a certificate showing the

approximate price of the land per hectare for non-irrigated agricultural land. A copy of the affidavit filed by the advocate for the petitioner namely Sandip Patel in the Court of District Judge, Vadodara in the original proceedings of Civil Misc. Application No.100 of 2005, is also produced. Thereafter, the petitioner has filed other two affidavits, both are of 14th October, 2005. When reading of these affidavits suggests that the petitioner wants to hammer a point that he has a better case on merit and probably the lower Court has grossly erred in not appreciating the basic contentions leading to the real controversy between the parties. The petitioner has also attempted to explain the case of his father Shri Vinubhai Patel, who was also one of the parties. It is also alleged that the signature of his father Vinubhai Patel is not the correct or genuine signature on the document (at page no.98) because his father Vinubhai used to sign in vernacular Gujarati language. He has also referred to the details of one Special Civil Suit No.828 of 1995 filed in the Court of

learned Civil Judge (S.D.), Vadodara, seeking specific performance of the agreement dated 09th July, 1993 executed by the petitioner and the other family members in favour of the plaintiffs of that suit. This very Vinubhai is not a petitioner though no conflict of interest is pleaded. The respondent no.1-Ramjibhai Maganbhai Parbadia was one of the plaintiffs in that suit along with other three persons. It is submitted that the plaintiffs of the Regular Civil Suit no.470 of 2001 have not approached the Court with clean hands and, therefore, while dealing with the application praying for condonation of delay, the learned Judge ought to have considered the strength and scope of ultimate success in the appeal preferred against the order passed below Application Ex.5 in Regular Civil Suit No.470 of 2001. It is the say of the petitioner that:

> *"(A) A suit is filed hri Ramjibhai Maganbhai Parbadia who is also plaintiff to Regular Civil Suit No.470/2001. He though impleads the petitioner and other co-owners as*

defendants no.1 to 7, he also impleads his real brother Shri Harjivan M. Parbadia as defendant no.8.

(B) Shri Ramjibhai Parbadia makes a hand written note below the cause title to serve summons of defendants no.1 to 7 upon defendant no.8. He shows defendant no.8 as the power of attorney holder of defendant no.1 to 7.

(C) The residential address of all the defendants is that of Shri Ramjibhai Parbadia.

The whole idea behind preparing the cause title of the suit in the above manner is to obtain orders from the owners of the land. The idea being that the summons on the suit are collected by Harjivanbhai and behind the back of the real owners, their valuable property is taken away by committing fraud on the Court."

7. It is stated by the petitioner that the lower

Court was apprised about the details which have been placed before this Court on oath by way of an affidavit (page 49 of the petition, relevant paragraph nos.17, 18, 19 and 20 of the affidavit) dated 14th October, 2005, which have been ignored by the lower Court and the same has resulted into grave injustice.

8. At this stage, the details given by the respondent-Bharatkumar Somani in his reply affidavit in paragraph no.33 needs consideration and it would be beneficial to reproduce the relevant part of the events, which according to me are relevant for the purpose of present decision.

9. The other details given by the respondents in paragraph nos.3.5 and 3.6 are not required to be commented upon because the finding if recorded, the same is likely to prejudice either party. But the allegation in substance of the respondent is that the delay is either deliberate or is nothing but sheer negligence on the part of the plaintiffs. During the oral submissions, it is also submitted that the

plaintiffs of Special Civil Suit No.323 of 2001, who had not pressed for ad interim relief in the Suit, had selected the present petitioner to file the present petition. The allegation of the respondent is that except the petitioner, the respondent nos.3 to 8 are trying to disturb the possession of respondent-Bharatkumar Somani and they have tried to put up a small construction at one place in the chunk of land. The defiance of the order by some of the plaintiffs of Special Civil Suit No.323 of 2001, who have been prevented by a prohibitory order passed by the Court and effective and operative at least qua those i.e. respondent nos.3 to 8, either of disobedience should be viewed seriously and the Court should not exercise supervisory jurisdiction by granting discretionary reliefs under Article 227 of the Constitution of India.

10. Mr.P.M. Thakkar, learned senior counsel appearing for the petitioner, has taken me through all the nine decisions cited in support of his arguments and they are as

under:

(i) *The decision of the High Court reported in 2005(2) GLH 150, in the case of Mahendrabhai Nagjibhai Patel v. Ilaben Mahendrabhai Patel. (Re.Para:3)*

(ii) *The decision of the High Court reported in 2005(2) GLH 612, in the case of Rashtriya Mazdoor Union v. Hindustan Petroleum Corporation Ltd. (Re.Paras : 15 & 16)*

(iii) *The decision of the Apex Court reported in (2003) 6 SCC 675, in the case of Surya Dev Rai v. Ram Chander Rai and others. (Re.Para:22)*

(iv) *The decision of the Apex Court reported in (2002) 9 SCC 644, in the case of Devendra Swamy v. Karnataka State Road Transport Corporation. (Re.Para:5)*

(v) *The decision of the Apex Court reported in AIR 1998 SC 3222, in the case of N. Balakrishnan v. M.*

Krishnamurthy.

(vi) *The decision of the Apex Court reported in 2002 AIR SCW 978, in the case of Ram Nath Sao alias Ram Nath Sahu and others v. Gobardhan Sao and others. (Re.Paras: 8 & 10)*

(vii) *The decision of the High Court reported in 1994(1) GLR 810, in the case of Patel Karshanbhai Dwarkadas v. State of Gujarat. (Re.Para:4)*

(viii) *The decision of the Apex Court reported in AIR 1987 SC 1353, in the case of Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others. (Re.Paras:3 & 15)*

(ix) *The decision of the Apex Court reported in AIR 1981 SC 1400, in the case of Rafiq and another v. Munshilal and another. (Re.Paras:2 & 3)*

11.1 I am also taken through the relevant parts of the above cited decisions i.e. paragraph no.3

of the first decision; paragraph nos.15 and 16 of the second decision; paragraph no.23 of the third decision; paragraph no.5 of the fourth decision; paragraph nos.8 to 10 of the sixth decision; paragraph no.4 of the seventh decision; paragraph nos.3 and 15 of the eighth decision and paragraph nos.2 and 3 of the ninth decision. While arguing on the strength of the fifth decision cited as above, it is argued that the delay of 883 days was found explained satisfactorily by the trial Court and that decision was disturbed by the High Court in exercise of revisional jurisdiction. The Apex Court held that the finding of the High Court is not proper. The Court can compensate the other party in such cases because the delay was due to failure of the advocate to inform the party as well as his failure to take action. The Apex Court had awarded costs of Rs.10,000/- to the otherside. I have carefully gone through this decision also. The question before this Court is whether the supervisory jurisdiction by issuing writ of certiorari should be exercised in the present case or not. The Apex Court had

not accepted the reasons assigned by the High Court while allowing the Revision Application filed by the party aggrieved; but the fact remains that the first discretionary order was passed in favour of the respondent of the said Revision Application. By adopting the pragmatic view if the competent Court condones the delay, even gross, in exercise of discretionary jurisdiction, whether should be disturbed in a revisional jurisdiction, was a question before the Court. Here in the present case, the competent Court has not shown any inclination to condone the delay. So while not accepting the request for condonation of delay, the subordinate Court whether has considered relevant aspects should be seen and evaluated. When the decision is found logical and the finding is based on comparatively sound legal footing, the jurisdiction vested with the Court under Article 227 of the Constitution of India need not be exercised.

11.2 On facts, the learned Additional District Judge has observed that this is a case of gross delay and the Court is not convinced on

facts that delay is the result of negligent act on the part of a lawyer. I am also not satisfied with the contents of the affidavit filed by one lawyer Dipak Dahyabhai Patel. The said lawyer has stated something which would rest on the conduct of any other lawyer i.e. Arvindbhai K. Patel. It emerges from record that one of the plaintiffs and respondent no.3 are not the rustic villagers and only agriculturists. They are well versed and educated and he was once thinking to contest the parliamentary elections. In the same way, the respondent no.8 is also well educated. So this is not a case of a poor or illiterate farmers who could be misled by a lawyer. Mr.Dipak Patel, Advocate, has stated that the father of the petitioner and the petitioner had a fight with Shri Arvindbhai Patel over 'No Objection' which was required to be obtained on a Vakalatnama and Arvindbhai Patel gave NOC on 06th May, 2005 is the say of Dipak Patel in his affidavit. A copy of Vakalatnama Ex.52 filed in Regular Civil Suit No.470 of 2001 is being claimed to be produced along with the affidavit but I do not find a copy of

Ex.52 on record. For the sake of argument, even if it is accepted that on account of NOC only, he could file Vakalatnama in the month of May, 2005 in Regular Civil Suit No.470 of 2001, would not have made the case of the petitioner and other plaintiffs stronger before the District Court and therefore, obviously the same shall have no impact or effect on the present proceedings.

11.3 It is settled that the proceedings under Order 39 Rules 1 and 2 or the proceedings under Order 38 or 40, which have been described as supplementary proceedings in the Code of Civil Procedure, 1908 are separate substantive proceedings themselves and the appeal preferred against the order passed in the supplementary proceedings, as per the scheme of Order 43 of the Code of Civil Procedure, 1908, would be independent proceedings. The suit can go on, irrespective of the pendency of the Misc.Civil Appeal under Order 43, unless stayed by the Appellate Court and there was no need to obtain NOC from the said advocate Mr.Arvind Patel even for Dipak Patel

to prefer Misc.Civil Appeal against the finding recorded below Ex.5 in Regular Civil Suit No.470 of 2001. The petitioner is a person who is undisputedly a party in declaring before the same Court that he is not interested in any interim prohibitory relief against the defendants where successful plaintiffs of Regular Civil Suit No.470 of 2001 were defendant nos.3 and 5 in that very suit.

12. One more fact emerging from record is that it is not the say of the petitioner that there was serious dispute between him and their lawyer even in the month of January, 2003. Undisputedly, the parties including the petitioner had appeared in Regular Civil Suit No.470 of 2001 filed by the respondent nos.1 and 2 and an ex-parte order of injunction in the nature of status-quo was also granted in favour of the plaintiffs of that suit dated 16th April, 2001. In that eventuality, the application Ex.5 preferred in Special Civil Suit No.323 of 2001 is found withdrawn on 17th

January, 2003. So the withdrawal of interim relief prayed for by the plaintiff along with the other plaintiffs in the month of January, 2003 speaks volumes about the alleged unawareness or absence of knowledge and the alleged controversy between them and their lawyer Arvindbhai Patel. On the contrary, by impeaching the lawyer Arvindbhai Patel under a vague affidavit, which has been filed in the present proceedings, by one another advocate Mr.Dipak Patel, the petitioner wants to see that his grossly time barred Misc.Civil Appeal is heard.

13. In most of the cited decisions, the allegations between the parties had reached to its logical end and the anxiety in all cases was to see that substantive justice is done and/or a gross miscarriage of justice is prevented and that should be the goal, is the say of the Apex Court. But in the present case, when the Court is asked to exercise jurisdiction under Article 227 of the Constitution of India, the petitioner is supposed to satisfy the Court that the lower

Court has failed in exercising the discretionary jurisdiction vested in it and the delay though was satisfactorily explained, the lower Court refused to exercise jurisdiction liberally.

14. The facts are found otherwise in the present case and it appears that the lower Court has considered various aspects and when it is observed that the order under challenge is basically an order passed in a supplementary proceedings and the parties shall have opportunity to put their case in support of the averments made in the plaint and the main reliefs prayed for in the respective suits, no serious prejudice is likely to be caused to the plaintiff or the petitioner. The order of status quo is granted in favour of respondent nos.1 and 2 of Regular Civil Suit No.470 of 2001. Therefore, the respondent nos.1 and 2 indirectly can be said to have been asked to maintain status quo. When there is no serious challenge about the execution of power of attorney in favour of Harjivanbhai Parbadia, the documents produced in support of the

petition shall have to be considered in that background because there is no relief even to have been prayed in the Suit that the power of attorney executed in favour of Harjivanbhai Parbadia also may be hold either revoked, cancelled or ineffective. It is rightly argued by Mr.Parthiv Shah that in the present case, the observations made by the Apex Court in the case of ***P.K. Ramchandran v. State of Kerala and others, reported in 1997 SAR (Civil) SC 804***, would be more applicable. It is not necessary to reproduce the relevant part but this relevant part has been reflected in the affidavit filed on behalf of the respondents. It is also settled legal position that a party praying for condonation of delay is not required to be place or give cause but it is supposed to satisfy the Court that the cause resulting into delay is sufficient within the meaning of Section 5 of the Limitation Act. Unexplained delay is always found fatal and it is categorically observed by the lower Court that in the present case, the petitioner/plaintiffs have failed to explain

the delay of about 60 days. The absence of explanation is materially different than unsatisfactory explanation and it is found that the appellant had failed in explaining delay of 60 days out of the entire period of delay.

15. For short, the Court finds that there is no merit in this petition and there is no scope to exercise inherent powers vested with the Court under Article 227 of the Constitution of India. The order of dismissal of the petition passed by the Court be treated as order of dismissal for aforesaid reasons.

(C.K. Buch, J)

Aakar